Editor's note:Appealed -- dismissed for lack of jurisdiction, (remanded to BLM for proceedings in conformity with IBLA decision); sub nom. American Colloid Co. v. Hodel, Civ.No. 88-0224-J (D.Wyo. Dec. 22, 1988), 701 F.Supp. 1537

SCOTT BURNHAM
(ON RECONSIDERATION)

IBLA 85-264 Decided June 10, 1988

Petition for reconsideration en banc of the Board's decision in Scott Burnham, 100 IBLA 94, 94 I.D. 429 (1987).

Petition granted; prior decision in Scott Burnham, 100 IBLA 94, 94 I.D. 429 (1987), affirmed.

1. Applications and Entries: Generally--Mining Claims: Lands Subject to--Segregation

   The notation of an application on the proper BLM records has a segregative effect only when a statute or Departmental regulation provides that the filing of the application segregates the land.

2. Contests and Protests: Generally--Evidence: Presumptions--Mining Claims: Generally--Rules of Practice: Generally--Statutes

   Neither the assumption required by 30 U.S.C. | 29 (1982) "that no adverse claim exists" nor the prohibition that "thereafter no objection from third parties to the issuance of a patent shall be heard" applies to invalidate mining claims. The inability to initiate an adverse proceeding once the publication period has passed does not render mining claims invalid if they are otherwise valid under the law.

3. Bureau of Land Management--Mining Claims: Determination of Validity--Mining Claims: Patent--Patents of Public Lands: Generally

   BLM has a duty to exercise its authority over mining claims to the end that valid claims are recognized, invalid ones eliminated, and the rights of the public preserved. BLM may not issue a mineral patent until it has assured itself that the applicant holds a valid mining claim by virtue of compliance with all aspects of the mining laws.

APPEARANCES: William N. Heiss, Esq., Casper, Wyoming, for appellant; Arthur H. Nielsen, Esq., Jonathan L. Reid, Esq., Thomas C. Jepperson, Esq., Salt Lake City, Utah, for American Colloid; Lyle K. Rising, Esq., Office of the Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

In Scott Burnham, 100 IBLA 94, 94 I.D. 429 (1987), this Board reversed and remanded a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated December 12, 1984, dismissing Burnham's protest of a mineral patent application filed by the American Colloid Company (W 80886) and declaring 18 mining claims located by Burnham null and void ab initio (WMC-225789 through 225806). We held that BLM erred in finding Burnham's claims to be null and void by reason of their location on land "segregated" by the prior patent application. Because of the existence of the mining claims, we found Burnham had standing to appeal BLM's decision dismissing his protest. The protest asserted that the mining claims included in the patent application had been improperly located while the land was withdrawn and, consequently, were void and no patent should issue. We found BLM to have incorrectly concluded that it could not consider the issues raised in the protest and, accordingly, we held the protest was improperly dismissed. We remanded the case with instructions for BLM to decide, in response to the protest, whether the mining claims in the patent application satisfy all legal requirements.

BLM has filed a petition requesting reconsideration en banc of the Board's decision. Reconsideration of a decision is available "in extraordinary circumstances for sufficient reason." 43 CFR 4.403. In its petition BLM argues that the Board committed grievous error as to three matters. For the reasons stated below, we find the matters raised to be sufficient to merit reconsideration of our decision and we grant the petition but affirm our prior decision after reconsideration. En banc consideration is not required. Petitioner's request for reconsideration has been reviewed by the original panel and a copy of this opinion has been circulated among all other members of the Board. None has opposed the decision to grant reconsideration but to nonetheless affirm our prior decision or requested a vote to grant reconsideration en banc. Cf. Fed. R. App. P. 35(b).

BLM first argues that a mining claim patent application, valid on its face, segregates the land from other appropriation due to the notation rule (Petition at 5). In particular, BLM argues that the notation of the patent application on the master title plat and serial register barred Burnham from locating mining claims on the land (Petition at 11).

[1] BLM's argument overlooks an important feature of the notation rule: the notation of an application on the proper BLM records has a segregative effect only when a statute or Departmental regulation provides that the filing of the application segregates the land. This feature of the rule was addressed in a number of decisions concerning mining claims located on

lands included in applications filed by Alaska Native regional corporations. In David Cavanagh, 89 IBLA 285, 299, 92 I.D. 564, 572 (1985), aff'd sub nom. Cavanagh & McCarthy v. Hodel, ___ F. Supp. ___ (D. Alaska 1988), the Board upheld a BLM determination that the notation rule applied to nullify mining claims located on lands for which Alaska State selection applications had been filed even though some of the lands at issue later had been excluded from the application.

Our review in Cavanagh began by quoting those regulations which provide that lands included in state selection applications are segregated
from appropriation. Id. at 290-21, 92 I.D. at 567. The Board reversed BLM's finding that mining claims located on land encompassed in a regional corporation selection filed under section 12 of the Alaska Native Claims Settlement Act (43 U.S.C. | 1611 (1982)) were null and void ab initio. The reason for reversal was that the regulations governing regional corporation selection applications do not provide that an application has a segregative effect. We stated:

> The very reason that the notation rule has been invoked in prior cases to perpetuate the segregative effect of State selection applications or other appropriations of the public domain even after particular applications have been rejected is that the public is presumed to know that certain kinds of applications trigger a segregative effect upon filing. Where the knowledge of law imputed to the public is that no segregative effect attaches, as is the case with section 12 regional corporation selections, the notation of such an application on the land status records cannot logically deter subsequent attempted appropriations for purposes authorized by law.

Id. at 303, 92 I.D. at 574. See Maurice E. DeBoer, 91 IBLA 317, 320 (1986); David D. Beal, 90 IBLA 87, 90 (1985); Basil S. Bolstridge, 90 IBLA 54, 56 (1985).

No statute or regulation providing that filing a mineral patent application has a segregative effect has been brought to our attention. A thorough search for relevant authority was made in preparing our initial decision. The only item found was the apparently defunct declaration in Andrew J. Gibson, 21 L.D. 219 (1895), cited in our opinion, Scott Burnham, supra at 107, 94 I.D. at 436. As was there discussed, a rule giving segregative effect to a mineral patent application would run contrary to several aspects of the mining laws. The same concerns apply equally to attributing segregative effect to the notation of a patent application.

Although BLM argues that the Board erred in failing to apply the notation rule, no authority has been cited which applies the notation rule to
a mineral patent application. Northern Pacific Railroad Co. v. Sanders, 166 U.S. 620, 635 (1897), cited by BLM, does hold that mineral patent applications in that case precluded a railroad grant from attaching, but the decision rests on a finding that the applications represented "claims" within the requirement of the statutory grant to the railroad that lands

subject to the railroad grant be "free from preemption or other claims or rights." Accordingly, we conclude that BLM's first argument offers no basis for changing our conclusion that a mineral patent application does not segregate land from the acquisition of competing rights.

As was explained in our prior decision, the law fully protects the locator of a valid mining claim but does so based on rights acquired under statute, not on the paper record of a mineral location or patent application. When BLM has completed its office adjudication of a mineral patent application, proof of posting and publication of notice of the patent application has been filed, the purchase price paid, and a receipt issued, a mineral entry is established, as documented by the Mineral Entry Certificate. 2 American Law of Mining, | 51.10[1] (2d ed. 1984). "With the issuance of a Final Certificate of mineral entry, the land encompassed by the mining claim is segregated from the location of other claims and may not be located by another." Scott Burnham, supra at 110, 94 I.D. at 437.

BLM's second argument is that the Board erred in finding Burnham to have had standing to appeal the dismissal of his protest. BLM argues that the Board has erred in its treatment of 30 U.S.C. | 29 (1982) in three respects. First, BLM believes the Board's decision eliminates the statute's requirement that adverse claimants to a patent application file their claims "within 60 days or be forever barred" (Petition at 11). Second, BLM argues that the Board has expanded an exception to eliminate the rule. Third, BLM alleges that the Board has created administrative problems for BLM and for patent applicants "by ensuring perpetual adverse claims" (Petition at 12). We decline to modifiy our ruling as to standing because we find BLM's concerns to have been adequately addressed in our prior decision.

The controlling statute does not explicitly require the holder of an adverse mining claim to file an adverse proceeding with BLM. Rather, the statute requires publication of notice of a patent application "for the period of sixty days." 30 U.S.C. | 29 (1982). It then provides (1) that when no adverse claim has been filed during the 60-day period, "it shall be assumed * * * that no adverse claim exists" and (2) "thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." Id. The requirement to file an adverse claim within the 60-day publication period arises from an adverse claimant's need to avoid both the consequences called for in the statute.

In addressing the assumption required by the statute, we stated that it "operates to effect a presumption that the patent applicant holds superior possessory title so that Department may proceed to determine the question of whether his mining claim is valid under the mining laws." Scott Burnham, supra at 116, 94 I.D. at 441. If Burnham had located his claims at the time the revocation of the withdrawal of the land became effective, as did other locators, he would have needed to file an adverse proceeding within the publication period in order to avoid the presumption. If he had failed to file, however, his claims would not necessarily be invalid. The "assump-
tion concerns Departmental review of patent applications, not the validity

of mining locations whether made prior to or after the date of the patent application, publication of notice, or any adverse proceeding resulting from it." Id. at 117, 94 I.D. at 441. In addition, Burnham would be barred from bringing any proceeding within the Department, except on the grounds "that the applicant has failed to comply with the terms of this chapter." Because filing an adverse proceeding entails asserting a superior right to some portion of the land included in a patent application, the effect of the second provision would be to bar filing an adverse proceeding after the publication period. However, the inability to file an adverse proceeding would not render the Burnham mining claims invalid. They would remain adverse claims, but the locator would lack a procedure within the Department to assert the superiority of his title as a reason to deny patent to the applicant.

In fact, Burnham did not locate his mining claims until after the 60-day publication period. BLM is correct that the Board recognized, based on P. Wolenberg, 29 L.D. 302 (1899), (On Review), 29 L.D. 488 (1900), and other cases cited and discussed, that the assumption called for by the statute does not apply to such claims. 1/ We did so because it would be absurd to conclude that publication of the patent application gave Burnham "notice to defend an interest which did not exist at the time an adverse claim could have been filed." Scott Burnham, supra at 117, 94 I.D. at 441. However, our conclusion as to the inapplicability of the assumption has little practical effect on BLM's review of the patent application. "There is no legal basis on which appellant's subsequently located claims can affect BLM's conclusions as to the validity of the company's locations." Id. BLM mistakenly construes our ruling on the assumption as applying to the second provision. However, as was stated, that provision still applies:

> It also does not follow from our conclusion about the effect of the statute that, following the location of his claims, appellant would have been entitled to file an adverse claim with the Department or that he is now entitled to bring one. See Healey v. Rupp, 37 Colo. 25, 86 P. 1015 (1906). The statute provides for adverse claims to be filed only "during the period of publication" and

1/ As pointed out by BLM, P. Wolenberg, supra, and other cases cited by the Board, concern allegations that mining claims had been relocated following the failure of a prior locator to perform annual assessment work. It does not follow, however, that the prior claim was invalid and that the cases did not involve adverse claims. To the contrary, in P. Wolenberg the Department cancelled the mineral entry but permitted the applicants to "renew proceedings for patent if they desire," in which case the protestant would "have an opportunity to present, for determination by the proper tribunal, his claim under his alleged relocation." Id. at 305. Consistent with 30 U.S.C. | 29 (1982), the prior claim was not regarded as extinguished or abandoned. See 2 American Law of Mining, || 45.08, 45.09 (2d ed. 1984). Our focus in discussing the case, however, was not the order cancelling the mineral entry, but the analysis of the assumption required by 30 U.S.C. | 29 (1982) "that no adverse claim exists." Scott Burnham, 100 IBLA at 113, 114, 94 I.D. at 439, 440.

makes no provision for their submission at any other time. 30 U.S.C. | 30 (1982).

Id. at 118, 94 I.D. at 442.

Thus, the Board did not hold that a party who locates a mining claim after the end of the publication period may file an adverse proceeding with BLM. The "exception" concerns the statutory assumption, "that no adverse claim exists," not the time set by statute for filing an adverse proceeding. Consequently, the administrative problems envisioned by BLM will not occur. Those attempting to initiate an adverse proceeding after the 60-day publication period may simply be told they are too late. The provision applies equally to claims located before and after the publication period. It does not, however, preclude filing a protest. Id. at 118-19, 94 I.D. at 442.

[2] The chief error underlying BLM's arguments is the same one made by American Colloid in raising the issue of standing in response to Burnham's appeal. It is the assumption that 30 U.S.C. | 29 (1982) can operate to invalidate mining claims. As has been discussed, neither provision of the statute has this effect. The inability to initiate an adverse proceeding once the publication period has passed does not render mining claims invalid if they are otherwise valid under the law. For this reason, we rejected American Colloid's argument that, due to the time of Burnham's location of his mining claims, he lacked basis for standing to appeal. For the same reason we rejected the advice given BLM in the Solicitor's memorandum that, even if Burnham succeeded in preventing issuance of the patent, his mining claims would be null and void due to his failure to file an adverse claim. Id. at 124, 94 I.D. at 445.

Nor is it the case that Burnham is "forever barred" from asserting the validity of his claims. He may not object to the issuance of a patent to American Colloid on grounds other than the company's failure to comply with the requirements of the mining laws. However, "if for any reason the patent application is rejected, matters are restored to where they stood prior to the application, and a rival locator may adverse a second application for the land or apply for patent himself." Id. at 117, 94 I.D. at 441.

BLM's third argument is that the Board's decision "effectively directs the BLM to ignore the decision of the Chief Judge of the United States District Court for the District of Wyoming" in approving "a settlement agree-ment that found title to the mining claims to be vested in the patent applicant" (Petition at 16-17). BLM repeats its position that judicial decisions should not be rejected "except for cogent reason or without seeing some harm somewhere to some Federal interest" and asserts the Board has failed to provide such a reason (Petition at 17). In particular, BLM states:

> there is no credible evidence there [in the record] that would compel the BLM to come to a different conclusion than the one already reached by Judge Brimmer in approving the settlement agreement and the BLM in dismissing Scott Burnham's protest. Nothing happened there that would require the BLM to cancel the

> claims, as all of the conduct by the patent applicant was well within decisions on allowable conduct in these circumstances (pre-staking) as set forth in decisions of the United States Supreme Court, as well as the Wyoming Supreme Court. See, e.g., Noonan v. Caledonia Gold Mining Co., 144 U.S. 658 (1982); LeClair v. Hawley, 18 Wyo. 23, 102 P. 853 (1909).

(Petition at 17-18 (emphasis in original)). BLM also asserts that "[t]he Board is incorrect in its assertion that BLM has not already independently determined that Scott Burnham's protest was without merit" (Petition at 18). In brief, BLM believes that the Board's decision reduces judicial decisions "on matters of possession and good faith to useless exercises in futility by requiring yet another trial of the same issues by BLM even though there is no evidence which has not been already considered and rejected by the BLM" (Petition at 20).

[3] The position advanced by BLM contains two fundamental errors. The first was addressed by our Burnham opinion in relation to the Solicitor's memorandum. The memorandum advised BLM, inter alia, to regard the issue of the "prestaking" of the claims "as one already dealt with and determined by the court." Scott Burnham, supra at 125, 94 I.D. at 446. The court, however, did not rule on the prestaking issue. "The outcome of the litigation was that notices of abandonment of mining claims were filed with BLM by various parties, and on September 8, 1983, Judge Brimmer issued a final order of dismissal pursuant to stipulations made among the parties." Id. at 98-99, 94 I.D. at 431. We reviewed the judgment issued by the court and found

> no part of it addressed the issue of prestaking. Rather, it establishes a division of the contested lands, awarding exclusive possession of some tracts to each of the parties. No portion of the judgment addresses the validity of the claims or makes findings of fact as to the locators' compliance with the mining laws.

Id. at 132-33, 94 I.D. at 450.

The parties filed notices of abandonment which eliminated the conflicts among their claims. The court found the parties holding the remaining claims to have exclusive possession. The Board has not instructed BLM, either expressly or implicitly, to ignore the judgment of the court. Rather, BLM is instructed to regard those parties found by the court to have exclusive possession as the parties which hold exclusive possession.

However, the judgment does not address any issue as to the locators' compliance with state and Federal mining laws, their good faith in locating their claims, or the legal issues concerning prestaking and adoption. BLM is not required to conduct "another trial of the same issues" because there was never a trial on those issues. BLM requires no "cogent reason" to reject the court's decision prior to considering these issues because they are not addressed by the judgment. To the contrary, BLM has a duty to exercise its authority over mining claims "to the end that valid claims

are recognized, invalid ones eliminated, and the rights of the public preserved." Cameron v. United States, 252 U.S. 450, 460 (1920). BLM may not issue a mineral patent until it has assured itself that the applicant holds a valid mining claim by virtue of compliance with all aspects of the mining laws.

BLM's second error is reflected in its statements about the relevant evidence in this case. In the decision appealed from, BLM first determined (incorrectly) that the Federal Court's judgment foreclosed the agency from using documents which had been part of the litigation. Finding that the protest presented "no additional evidence apart from that considered by the Court," BLM dismissed the protest. Scott Burnham, supra at 99-100, 94 I.D. at 433. Thus, BLM has not considered the factual allegations and legal issues raised by the protest. Nor is BLM precluded from considering the documents which were before the Court as part of the motions for summary judgment. As we observed in Burnham, the Court's ruling denying the motions "recognizes that Noonan approves of adoption as a doctrine of mining law and that the case might apply to an adoption made by American Colloid." But without a finding of fact the Court's action "cannot be regarded as ruling on the issues of prestaking and adoption or approval of adoption in regard to American Colloid's claims." Id. at 134, 94 I.D. at 451.

We do not accept the assertion that BLM has already considered the evidence and independently determined the protest to be without merit, as no such finding appeared in the decision and record we reviewed on appeal. Other than the Durtsche deposition which was part of the litigation, the record presented to us contained only allegations about the activities engaged in by American Colloid. The company acknowledged that it had conducted various activities on the withdrawn land, but referred to them only as "preparatory work" and "prerestoration activities." Accordingly, our remand instructs BLM to "ascertain the facts as to American Colloid's activities on the land prior to the revocation of the withdrawal as they pertain to the company's location of its mining claims." Id. at 137, 94 I.D. at 452. Once BLM has done so, and has considered the legal issues raised by the protest, it shall "independently decide whether the subject claims satisfy all legal requirements in response to the protest filed" and issue a decision addressing these matters. Id.

BLM's assertion that all the conduct of the patent applicant was within applicable judicial decisions lacks not only a determination of the facts, but also fails to distinguish between adoption and prestaking and fails to recognize that prestaking is widely recognized as an unsettled issue in mining law. See 2 American Law of Mining, || 14.05[3], 33.02[2] (2d ed. 1984); Marsh & King, "Staking Mining Claims on Revoked Public Land Withdrawals: Issues and Alternative Strategies," 30 Rocky Mt. Min. L. Inst., ch. 9 (1984). In addition to the issues which can arise in a dispute between rival locators, additional issues are raised when a locator seeks to have BLM recognize that he has acquired rights to Federal land. Among other concerns, an issue of good faith is raised concerning the locator's "knowledge and purposes in attempting to obtain rights to Federal lands by establishing mining claims." Scott Burnham, supra at 136, 94 I.D. at 452.

BLM must recognize these issues when it proceeds to adjudicate this matter on remand.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted. Having reconsidered our decision in Scott Burnham, supra, we adhere to our prior opinion and again remand the case to BLM for proper consideration of the issues raised in the protest.

Franklin D. Arness
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

John H. Kelly
Administrative Judge